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No.

Supreme Court of the United States

OCTOBER TERM, 1981

NEW YORK UNDERWRITERS INSURANCE COMPANY,

Cross-Petitioner,

v.

MARGARITA SALAZAR JUANES, et al,

Cross-Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether Cross-Petitioner is entitled, as a matter of law, to a portion of any recovery awarded to Cross-Respondents who were Plaintiffs in the trial court below?

PARTIES

Cross-Petitioner, New York Underwriter Insurance Company, was an Intervenor in the trial court and Intervenor-Appellant in the Court of Appeals for the Fifth Circuit. Cross-Respondents Margarita Salazar Juanes; Marcella Salazar Juanes, a minor; Edgar Salazar Juanes, a minor; Carlos Eladio Salazar Juanes, a minor; Gema Del Socorro Salazar Juanes, a minor; and Patrick A. Abeyta as Guardian ad Litem for said minors were Plaintiffs in the trial court and Appellants in the Court of Appeals for the Fifth Circuit and petitioners for writ of certiorari herein, No. 81-400. Cross-Respondents Southwestern Public Service Company, a New Mexico corporation; Conlee Grain, Inc., a Texas corporation; Louisiana Seed Company, a Louisiana corporation; Hutchinson Division, Royal Industries, Inc., a California corporation; Donald Conlee; Douglass Conlee; J. D. Conlee; Ronald Douglas; Faustino Juanes; and Maria De Los Angeles Jaquez Juanes were Defendants in the trial court and Appellees in the Court of Appeals for the Fifth Circuit.

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OPINION BELOW

The opinion of the Court of Appeals is set forth in the appendix to this petition, pp. A-1, A-2.

JURISDICTION

The judgment of the Court below (appendix, p. A-3) was entered on April 21, 1981. A timely petition for rehearing was denied on May 26, 1981 (appendix, A-4). A petition for Writ of Certiorari was filed herein by Cross-Respondent Margarita Salazar Juanes et al on August 24, 1981 and filed as No. 81-400 in this Court a copy thereof having been received by this Cross-Petitioner on August 27, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and Supreme Court Rule 19.5 allowing a cross-petition to be filed within 30 days of the receipt of a Petition for Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Federal Rules of Civil Procedure

   Rule 24(a). Intervention of Right. (Full text of this provision is set forth in the appendix, p. A-5.)

2. State Statute

   Article 8307, Section 6a, Vernon's Annotated Civil Statutes. Recovery from third person; subrogation; attorney's fees. (Full text of this provision is set forth in the appendix, p. A-5.)

STATEMENT OF THE CASE

Juan Jaquez Juanes was killed while employed by Conlee Seed Company. As a result of his death, New York Under-

writers Insurance Company has paid various sums of money to his survivors under the Texas Workers' Compensation statutes.

The facts surrounding the death of Juan Jaquez Juanes are set forth in the petition of his widow and minor children filed herein as Petition for Writ of Certiorari No. 81-400. Based upon such facts, said petitioners sought to recover from the various defendants for the wrongful death of Juan Jaquez Juanes in the United States District Court for the Northern District of Texas. New York Underwriters Insurance Company was granted leave to intervene in the suit and sought to recover the Workers' Compensation payments made to Plaintiffs in the event of a recovery pursuant to Texas statutes. The trial court entered a judgment based upon a jury verdict that both Plaintiffs and Intervenor take nothing. The Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT

THE CROSS-PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED TO PRESERVE RIGHTS GRANTED BY A STATUTE OF THE STATE OF TEXAS.

Cross-Petitioner seeks only to preserve its rights to subrogation in the event the Petition for Writ of Certiorari filed herein in No. 81-400 is granted. Under the rules of this Court, and as a matter of law, this petition becomes moot if the petition filed by the Juanes Cross-Respondents is denied. If granted, however, it is equally clear that this petition should likewise be granted.

Cross-Petitioner, at all times material to this suit, was workers' compensation carrier for Conlee Seed Co., the

employer of Juan Jaquez Juanes on account of whose death this action arose.

Decedent's death occurred in the course of his employment for the above-named employer and, as the workers' compensation carrier, Cross-Petitioner assumed liability to pay the workers' compensation death benefits due under the Texas Statute.

Under Section 6a of Article 8307, V.A.T.S., (appendix, A-5) Cross-Petitioner is entitled to recover the first monies paid to or recovered by the Juanes' survivors against third parties responsible for his death, until it has recouped such expenditures together with any payments made as the suit progresses. *Ellis v. Kenworth Motor Truck Co.*, 466 F.Supp. 441 (D.C. 1979); *Capitol Aggregates Inc. v. Great American Insurance Company*, 408 S.W.2d 922 (Texas 1966).

Cross-Petitioner was granted leave of court to intervene in this suit to assert its statutory subrogation right under the Texas statute pursuant to Rule 24(a), Federal Rules of Civil Procedure (appendix, A-5), which authorizes such intervention.

All evidence required to support Cross-Petitioner's right of intervention and right of recoupment, as a matter of law, was introduced in the form of a stipulation of the parties. No party has sought to contest this right. Thus, if the Juanes petition is granted, this petition should likewise be granted to preserve the rights of Cross-Petitioner.

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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A-1

In The

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNIT A

No. 80-1510

MARGARITA JUANES, *et al.*,

Plaintiffs-Appellants,

NEW YORK UNDERWRITERS' INSURANCE COMPANY,

Intervenor-Appellant,

vs.

SOUTHWESTERN PUBLIC SERVICE CO., ETC., et al.,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Texas

(APRIL 21, 1981)

Before THORNBERRY, COLEMAN and AINSWORTH, Circuit Judges.

PER CURIAM:

On October 2, 1977, Juan Jacques Juanes was accidentally electrocuted while assisting in moving a grain augur from one location to another, the augur having come in contact with overhead high tension electric wires. The Juanes family received, and are receiving, Workers' Compensation benefits from the employer's insurance carrier. On various grounds suit was filed against a number of defendants, including a claim of gross negligence against the employer. The case was tried to a jury which returned a verdict in favor of all defendants. This appeal followed. We heard oral argument in New Orleans on April 20, 1981. Upon consideration of the trial record, the briefs of the respective parties, and oral argument, it clearly appears that the issues were for the resolution of the jury. No reversible error was committed in the process of submitting the case to the jury nor in the denial of a motion for a new trial. Accordingly, we must affirm the judgment which the District Court entered in conformity with the verdict of the jury.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 80-1510

D. C. Docket No CA-5-78-80

MARGARITA JUANES, ET AL.,

Plaintiffs-Appellants,

NEW YORK UNDERWRITERS' INSURANCE COMPANY,

Intervenor-Appellant,

v.

SOUTHWESTERN PUBLIC SERVICE CO., ETC., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

Before THORNBERRY, COLEMAN and AINSWORTH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiffs-appellants and intervenor-appellant pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

APRIL 21, 1981

In The
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNIT A

No. 80-1510

MARGARITA JUANES, *et al.*,

Plaintiffs-Appellants,

NEW YORK UNDERWRITERS' INSURANCE COMPANY,

Intervenor-Appellant,

vs.

SOUTHWESTERN PUBLIC SERVICE CO., ETC., et al.,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING
(May 26, 1981)

Before THORNBERRY, COLEMAN and AINSWORTH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED and the mandate will issue forthwith.

ENTERED FOR THE COURT:

Jas. P. Coleman
United States Circuit Judge

Federal Rules of Civil Procedure, Rule 24(a).

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Article 8307, Section 6a, Vernon's Annotated Texas Statutes

Art. 8307, sec. 6a. Recovery from third person; subrogation; attorney's fees

Sec. 6a. Where the injury for which compensation is payable under this law was caused under circumstances creating a legal liability in some person other than the subscriber to pay damages in respect thereof, the employee may proceed either at law against that person to recovery damages or against the association for compensation under this law, and if he proceeds at law against the person other than the subscriber, then he shall not be held to have waived his rights to compensation under this law. If the claimant is a beneficiary under the death benefits provisions of Section 8a, Article 8306, Revised Civil Statutes of Texas, 1925, as amended, a judgment shall not constitute an election but the amount of such recovery shall first pay costs and attorney's fees and then reimburse the association, and if there be any excess it shall be paid to the beneficiaries in the same ratio as they received death benefits and the

association shall suspend further payments of benefits until the suspended benefits shall equal the amount of such excess at which time benefits shall be resumed. If compensation be claimed under this law by the injured employee or his legal beneficiaries, then the association shall be subrogated to the rights of the injured employee, and may enforce in the name of the injured employee or of his legal beneficiaries the liability of said other person, and in case the recovery is for a sum greater than that paid or assumed by the association to the employee or his legal beneficiaries, then out of the sum so recovered shall be paid to the injured employee or his beneficiaries. However, when the claimant is represented by an attorney, and the association's interest is not actively represented by an attorney, the association shall pay such fee to the claimant's attorney not to exceed one-third (1/3) of said subrogation recovery or as may have been agreed upon between the claimant's attorney and the association or in the absence of such agreement the court shall allow a reasonable attorney's fee to the claimant's attorney for recovery of the association's interest which in no case shall exceed thirty-three and one-third per cent (33-1/3%) payable out of the association's part of the recovery. In any case where the claimant's attorney is also representing the subrogated association, a fully written disclosure must be made to the claimant, prior to actual employment by the association as an attorney, and acknowledged by the claimant, and a signed copy of the same furnished to all concerned parties and made a part of the file in the Industrial Accident Board. A copy of the disclosure with authorization and consent, shall also be filed with the claimant's pleadings prior to any judgment entered and approved by the court. Unless the claimant's attorney

complies with all of the requirements as prescribed in this section, the attorney shall not be entitled to receive any of the fees prescribed in this section to which he would be entitled pursuant to an agreement with the association.

If the association obtains an attorney to actively represent its interest and if the attorney actively participates in obtaining a recovery, the court shall award and apportion an attorney's fee allowable out of the association's subrogation recovery between such attorneys taking into account the benefit accruing to the association as a result of each attorney's service, the aggregate of such fees not to exceed thirty-three and one-third per cent (33-1/3%) of the subrogated interest.

If at the conclusion of a third party action a workmen's compensation beneficiary is entitled to compensation, the net amount recovered by such beneficiary from the third party action shall be applied to reimburse the association for past benefits and medical expenses paid and any amount in excess of past benefits and medical expenses shall be treated as an advance against benefit payments of compensation to which the beneficiary is entitled to receive under the Act. When the advance is adequate to cover all future compensation and medical benefit payments as provided by this law, no further payments shall be made by the association but if insufficient, the association shall resume such payments when the advance is exhausted. The reasonable and necessary medical expenses incurred by the claimant on account of the injury shall be deducted from the advance in the same manner as benefit payments.